The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

July 23, 2004

D.T.E. 03-121

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 136A and 137A - Boston Edison Company; M.D.T.E. Nos. 237C, 238C, 239C, 254A and 255A - Cambridge Electric Light Company; and M.D.T.E. Nos. 337A and 338A - Commonwealth Electric Company, filed on January 16, 2004, to become effective February 1, 2004, by Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company d/b/a NSTAR Electric.

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ORDER ON OFFER OF SETTLEMENT

I. INTRODUCTION

On October 31, 2003, pursuant to G.L. c. 164, § 94 and 220 C.M.R. §§ 5.00 et seq., Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company ("Company" or "NSTAR Electric") filed for approval by the Department of Telecommunications and Energy ("Department"), tariffs designed to establish standby rates for large and medium-sized commercial and industrial customers who have on-site, self-generation facilities, sometimes referred to as distributed generation ("DG") facilities.[1] On November 26, 2003, the Department suspended the operation of the tariffs until June 1, 2004. NSTAR Electric, D.T.E. 03-121 (2003). On January 16, 2004, the Company refiled the tariffs in this docket. On January 29, 2004, the Department suspended the operation of the refiled tariffs until August 1, 2004, in order to investigate the propriety of the Company's proposed tariffs. NSTAR Electric, D.T.E. 03-121 (2004).

On February 10, 2004, the Department conducted a public hearing and procedural conference. The Attorney General of the Commonwealth ("Attorney General") intervened pursuant to G.L. c. 12, § 11E. The Department granted full intervenor status to the following entities: Associated Industries of Massachusetts ("AIM"); the Conservation Law Foundation, Inc. ("CLF"); the Division of Energy Resources ("DOER"); FuelCell Energy, Inc.; Fitchburg Gas and Electric Light Company ("FG&E"); Boston Public Schools, Co-Energy America, Inc., National Association of Energy Service Companies, Inc., and Siemens Building

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[1] G. L. c. 164, § 1 defines distributed generation as "a generation facility or renewable energy facility connected directly to distribution facilities or to retail customer facilities which alleviate or avoid transmission or distribution constraints or the installation of new transmission facilities or distribution facilities."

Technologies District One (together, the "Joint Supporters");[2] Low Income Weatherization and Fuel Assistance Network and Mass Community Action Program Directors Association; Massachusetts Electric Company ("MECo"); the New England Distributed Generation Coalition ("NEDGC"), consisting of - Aegis Energy Services, Inc., American DG, Inc., Equity Office Properties Trust, Inc., Northern Power Systems, Inc., OfficePower LLC, RealEnergy, Inc., Tecogen Inc., and Turbosteam Corporation; the Solar Energy Business Association of New England ("SEBANE"); The Energy Consortium and five named members - Harvard University, Polaroid Corporation, Massachusetts Institute of Technology, USG Corporation, and Shaw's Supermarket (together, "TEC"); UTC Power, LLC; Western Massachusetts Electric Company ("WMECo"); and the Western Massachusetts Industrial Customer Group ("WMICG"), consisting of - General Electric Company, MeadWestvaco Corporation and Solutia, Inc. The Department granted limited participant status to the following entities: Constellation NewEnergy, Inc.; limited participants associated with the Joint Supporters - Allied Utility Network, LLC; Dgsolutions, LLC; The E Cubed Company, LLC; Energy Concepts Engineering, PC; Pace Law School Energy Project; and Predicate, LLC.; Keyspan Energy Delivery New England ("Keyspan"); Plug Power, Inc; and Wyeth Pharmaceuticals, Inc. ("Wyeth"). On February 12, 2004, NEDGC filed a motion to dismiss NSTAR Electric's filing.

On April 22, 2004, the Department conducted a pre-hearing conference to discuss procedural matters. On April 23, 2004, NEDGC, DOER, the Joint Supporters and CLF filed

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[2] The Joint Supporters include some entities that have been allowed full intervenor status and some that have been allowed limited participation to this proceeding. Only parties to a proceeding may enter into an offer of settlement. 220 C.M.R. § 1.10(8).

a joint motion to dismiss NSTAR Electric's case and commence a new tariff investigation based upon testimony that NSTAR Electric filed on April 21, 2004. This motion and NEDGC's February 12th motion are addressed in Section II. below.

The Department conducted eight days of evidentiary hearings, beginning on April 28, 2004 and ending on May 13, 2004. NSTAR Electric sponsored the testimony of: Henry C. LaMontagne, director of regulatory policy and rates for the regulated operating companies of NSTAR Electric; Charles P. Salamone, director of system planning for NSTAR Electric; and Dr. Heathie S. Parmesano, vice-president at National Economic Research Associates. Nine intervenors sponsored witnesses. The NEDGC sponsored the testimony of: Sean Casten president and owner of Turbosteam Corporation; Thomas W. Smith, vice-president energy operations for Equity Office Properties Trust, Inc.; and Spiro Vardakas, CEO and CFO of Aegis Energy Services. TEC sponsored the testimony of Elaine Saunders, independent consultant. DOER sponsored the testimony of Dr. Alvaro A. Pereira, manager of energy supply and pricing at DOER. FG&E sponsored the testimony of David K. Foote, senior vice-president of FG&E. WMECo sponsored the testimony of Edward A. Davis, manager of pricing strategy and administration for Northeast Utilities Service Company. MECo sponsored the testimony of Carlos Gavilondo, vice-president, distribution and regulatory services. The Joint Supporters sponsored the testimony of David Hannus, president of Co-Energy America, Inc. The Joint Supporters, CLF, and DOER sponsored the testimony of Mark B. Lively, engineering consultant specializing in pricing issues related to natural gas and electricity. SEBANE sponsored the testimony of Andrew G. Greene, principal at Navigant Consulting, Inc. SEBANE and CLF sponsored the testimony of Thomas S. Michelman, president of Thomas S. Michelman, Inc.

On June 4, 2004, NSTAR Electric, DOER, AIM, CLF, the Joint Supporters and SEBANE filed (1) a Joint Motion for Approval of Settlement Agreement ("Settlement Motion"); and (2) an Offer of Settlement Agreement ("Settlement"). The Settlement states that it resolves all issues relating to this proceeding (Settlement at 2, § 1.6). The Settlement Motion requests approval of the Settlement in its entirety by June 30, 2004 (Settlement Motion at 1; Settlement at § 3.5). The approval date was later extended.[3] Comments by non-signatories to the Settlement were filed on June 11, 2004. Reply comments were filed on June 18, 2004.

II. OUTSTANDING MOTIONS

A. NEDGC Motion to Dismiss

1. The NEDGC Motion

On February 12, 2004, NEDGC, pursuant to 220 C.M.R. §§1.04(5) and 1.06(6)(e), filed a motion to dismiss the January 16, 2004 filing of NSTAR Electric ("NEDGC Motion"). In the alternative, NEDGC requests that, should the Department not dismiss the NSTAR Electric filing, that it should consider the filing as a petition for a generic investigation of standby rates pursuant to Distributed Generation, D.T.E. 02-38-A (2002) (Order Establishing a Distributed Generation Forum) (NEDGC Motion at 1, 15).

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[3] On June 30, 2004, the Settling Parties amended the Settlement and Settlement Motion to request Department approval of the Settlement by July 16, 2004. On July 16, 2004, the Settling Parties extended the deadline for Department approval of the Settlement until July 23, 2004.

NEDGC argues that the NSTAR Electric filing violates: (1) the standards for standby rates adopted by the Department in Cambridge Electric Light Company/ Massachusetts Institute of Technology, D.P.U. 94-101/95-36 (1995); (2) the Department's Qualifying Facility ("QF") Regulations at 220 C.M.R. § 8.06; and (3) the regulations of the Federal Energy Regulatory Commission ("FERC"), pertaining to QFs at 16 C.F.R. § 292.305 (id. at 1-2).[4] NEDGC contends that NSTAR Electric's proposal to assess charges based upon a contract demand[5] instead of actual demand is inconsistent with D.P.U. 94-101/95-36 (id. at 4-5, citing D.P.U. 94-101/95-36, at 47-48). NEDGC claims that NSTAR Electric's failure to provide load data specific to the standby class renders the Company's filing "patently deficient" (id. at 6). NEDGC claims that, absent this load data, there is no evidence that assessing standby rates on the basis of actual demand would cause under recovery of costs (id. at 5). NEDGC maintains that NSTAR Electric's proposal to base the standby rates on the otherwise applicable general service rate for all-requirements customers is unlawful (id. at 6). NEDGC asserts that, absent load data specific to standby service, standby service rates should be based on marginal cost, not the otherwise applicable rates (id., citing D.P.U. 94-101/95-36, at 45-46).

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4 QF refers to a generating facility that meets certain criteria specified by the Public Utility Regulatory Policies Act of 1978. See 18 C.F.R. §§ 292.101 et seq.. Designation as a QF can be achieved through compliance with certain thermal efficiency standards. In addition, certain hydro-power facilities may also be designated as a QF.

5 Contract demand for standby service is the level of distribution capacity that a customer agrees to pay to have available at all times.

NEDGC contends that the Department's QF regulations require that DG classified as QFs[6] have a right to take service under rates available to customers without such facilities (id. at 8-9, citing 220 C.M.R. §§ 8.06(1) and (2)). NEDGC claims that the NSTAR Electric proposal violates these Department regulations because QFs and on-site generators are subject to a demand ratchet under the standby rates instead of taking service under rates available to non QFs and on-site generators (i.e., the otherwise applicable rates) (id. at 9-12).[7] However, NEDGC admits that not all on-site generation is either a "QF" or "On-Site Generating Facility" as defined in the QF regulations (id. at 10, n.4). NEDGC argues that it would be "poor policy" to establish rates for QFs that are different from non-QFs with similar service characteristics (id. at 10).

NEDGC also argues that the NSTAR Electric tariffs violate FERC regulations pertaining to standby and maintenance rates for QFs (id. at 12). NEDGC maintains that NSTAR Electric's use of a contract demand implicitly assumes not only that all standby customers will require standby service simultaneously, but also that all standby customers will require standby service at the time of system peak (id. at 13). NEDGC asserts that NSTAR Electric has provided no data to support this assumption, in violation of 18 C.F.R. § 292.305

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6 On-site generating facilities are defined as 60 kilowatts or below, and are eligible for net metering. G.L. c. 164, § 1G(g)(iii); 220 C.M.R. § 8.02. However, the tariffs under consideration in this proceeding concern all on-site or DG facilities that interconnect to NSTAR Electric's distribution system, regardless of size.

7 Under a demand ratchet, customers are billed every month on the basis of an annual contract demand, or a demand level previously established, instead of the customer's actual demand usage for the billing month as, for example, when billing is based on the peak monthly demand or usage of the customer during the twelve months immediately preceding the particular monthly bill.

(c)(1) (id.). Thus, NEDGC contends that these violations of FERC regulations support dismissal of NSTAR Electric's filing (id. at 14). NEDGC argues that these regulations, as a matter of policy, should apply to non-QFs as well (id. at 12-13).

2. Positions of the Parties

a. NSTAR Electric

On February 24, 2004, NSTAR Electric filed an opposition to the NEDGC Motion arguing the Department must deny the motion ("NSTAR Electric Opposition"). NSTAR Electric argues that the NEDGC Motion fails to demonstrate that NSTAR Electric has asserted no statement of facts which, if proven, would support their request for approval of the tariffs (NSTAR Electric Opposition at 2). The Company claims that although the Department established legal standards for standby rates in D.P.U. 94-101/95-36, it does not mean that a different proposal, based on new facts in a restructured industry, is unlawful and should be dismissed (id. at 4). NSTAR Electric argues that although the Department may establish precedent in adjudicatory proceedings, ratemaking is an evolving process and that parties are not precluded from revisiting issues in subsequent cases (id. at 4-6, citing Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 105 (1975)). The Company notes that NEDGC has a factual dispute with the Company witness' testimony on cost-causation and rate design issues (id. at 8). The Company asserts that this factual dispute removes any legitimate basis for dismissal (id.).

The Company asserts that the proposed tariffs do not violate Department or federal QF regulations (id. at 9). The Company maintains that it has presented testimony that its proposed rates are cost-based, which is the approach that avoids the type of discrimination that would conflict with QF regulations (id. at 11). NSTAR Electric adds that the QF regulations do not apply to all on-site generation (id. at 10). NSTAR Electric argues that to the extent that these regulations would apply to these tariffs, if at all, it would require the Department to make a factual determination through a hearing process (id. at 9, citing Massachusetts Institute of Technology, 74 FERC ¶ 61,221 (1996)).

b. The Attorney General

On February 24, 2004, the Attorney General filed a response to the NEDGC Motion ("AG Response"). The Attorney General states that because the Company's filing has raised many issues best examined in the context of a full evidentiary hearing, the Department should deny the NEDGC motion (AG Response at 2).

The Attorney General notes that the Department had previously approved standby rates on a case-by-case basis and that the Department did not establish new standards for approving standby rates in D.P.U. 94-101/95-36, as NEDGC argues (id., citing D.P.U. 94-101/95-36, at 46-47). The Attorney General adds that NEDGC's contention demonstrates that there is a factual dispute over the basis of the proposed rates and a policy dispute concerning the appropriate method to use when calculating standby rates (AG Response at 4). The Attorney General adds that the Department has wide latitude under FERC's QF regulations to determine whether rates for the sale of electricity to QFs are just and reasonable and that such a determination is factual in nature and cannot be determined as a matter of law (id., citing D.P.U. 94-101/95-36, at 15-16).

3. Standard of Review

The Department's Procedural Rule, 220 C.M.R. § 1.06(6)(e), authorizes a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial pleading. In determining whether to grant a motion to dismiss, the Department must find beyond doubt that the petitioner could prove no set of facts in support of its petition. See Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988).[8] The Department takes the assertions of fact as true and construes them in favor of the non-moving party. Id. at 26-27. Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id.[9]

4. Analysis and Findings

In support of the proposed tariffs, the Company presented testimony that: (1) summarized the history of standby rates in Massachusetts; (2) explained how the Company's proposed standby tariffs were designed; (3) described the Company's objectives of the design of the tariffs; and (4) argued how the tariffs implement rate structure polices established by the Department (Exhs. NSTAR-HCL-1; NSTAR-HCL-2; NSTAR-HCL-3;

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8 Procedures for dismissal and summary judgment properly can be applied by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 783-786 (1980); Hess and Clark, Div. of Rhodia, Inc. v. Food and Drug Administration, 495 F. 2d 975, 985 (D.C. Cir. 1974).

9 Although Riverside refers to Massachusetts Rule of Civil Procedure 12(b)(6), the Department has not adopted formally Rule 12(b)(6). See Attorney General v. Department of Public Utilities, 390 Mass. 208, 212-213 (1983) (rules of court do not govern procedure in executive Department).

NSTAR-HCL-4; NSTAR-HCL-5; NSTAR-HCL-6). The Supreme Judicial Court has held that the Department's authority to design and set rates pursuant to G.L. c. 164, § 94 is broad and substantial. Massachusetts Oilheat Council v. Department of Public Utilities, 418 Mass. 798, 803 (1994); Boston Real Estate Board v. Department of Public Utilities, 334 Mass. 477 (1956). Within a range established by the Department, the question of what rates to charge is a matter for the Company's determination. See American Hoechest v. Department of Public Utilities, 379 Mass 408, 411 (1980).

Taking NEDGC's allegations that the Company's tariffs are inconsistent with Department rate design precedent, and construing them in favor of the Company, the Department cannot find beyond doubt that NSTAR Electric would be unable to prove any set of facts in support of the Company's claim that the proposed tariffs implement rate structure policies established by the Department. Based on the Company's filing, and without deciding final matters in this ruling, an inference may reasonably be drawn that the Company's filing presents cost-based rates for a distinct class of customers, and that the Company has shown a credible distinction from the Department's findings in D.P.U. 94-101/95-36 concerning the approval of standby rates.

Regarding NEDGC's claim that the NSTAR Electric tariffs are inconsistent with QF regulations, NEDGC concedes that these regulations do not apply to all on-site generators that may take service under the tariffs proposed in this proceeding because some of them may not be QFs or on-site generators, as defined by G.L. c. 164, § 1G(g)(iii), and 220 C.M.R. § 8.02. In light of the fact that QF regulations may not apply to all on-site generators, and construing the facts in favor of NSTAR Electric, the Department cannot find that NSTAR Electric would be unable to prove any set of facts in support of NSTAR Electric's claim that the Company's proposed tariffs are consistent with Department and federal QF regulations. Accordingly, the Department denies NEDGC's motion to dismiss the NSTAR Electric tariffs.

Should the Department deny its motion, NEDGC requests the Department to consider the filing as a petition for a generic investigation of standby rates pursuant to D.T.E. 02-38-A. However, as a result of the tariff filing, pursuant to G.L. c. 164, § 94, the Department suspended the operation of the NSTAR Electric tariffs to investigate the propriety of the rates requested. NSTAR Electric, D.T.E. 03-121 (2004). This tariff investigation, by its very nature, is subject to a statutory deadline, specific to the NSTAR Electric tariffs (and those issues listed in the notice to this proceeding) and cannot be a generic investigation of standby rates applicable to all Massachusetts electric companies. See NSTAR Electric, D.T.E. 03-121 (Notice of Public Hearing and Procedural Conference (January 20, 2004)). Converting the § 94 petition into a generic that extends beyond the six-month deadline found in G.L. c. 25, § 18, would be tantamount to dismissal or disallowance of the tariffed rates. As the filing was not facially deficient, such a course of action in advance of an investigation would not be sustainable. Therefore, we deny NEDGC's alternative request that the Department consider the NSTAR Electric filing as a petition for a generic investigation of standby rates pursuant to D.T.E. 02-38-A.

B. Second Motion to Dismiss or Disallow Certain Rebuttal Testimony

1. Second Motion to Dismiss

On April 23, 2004, NEDGC, DOER, the Joint Supporters, and CLF, pursuant to 220 C.M.R. §§ 1.04(5) and 1.06(6)(e), filed a motion (i) to dismiss the current NSTAR Electric standby rates proposal (i.e., tariffs filed on January 16, 2004) and commence a new rate case, or, in the alternative, (ii) to disallow certain NSTAR Electric rebuttal testimony (filed on April 21, 2004) and modify the procedural schedule ("Second Motion") (see Exhs. NSTAR-HCL-7 through 10; Exhs. NSTAR-CPS-1 and 2; and Exhs. NSTAR-HSP-1 through 3).[10] The Second Motion argues that on April 21, 2004, as part of its rebuttal testimony, NSTAR Electric filed revised tariffs (Exh. NSTAR-HCL-10) that render the tariffs filed on January 16, 2004 moot (Second Motion at 1-2). The Second Motion asserts that the revised tariffs are significantly different than those originally filed, supersede the originally filed tariffs and constitute a new tariff filing (id. at 6-7, Att. A). In addition to the revised tariffs, the Second Motion notes that NSTAR Electric also filed rebuttal testimony by three witnesses, amounting to more than one hundred pages, "far in excess of the original filed direct testimony" (id. at 3).

The Second Motion argues that neither the Department nor the intervenors can reasonably be expected to complete a full and thorough review of the revised tariffs in the few days before the hearing (id. at 7). The Second Motion asserts that given that the volume of the

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10 Subsequently, DOER, the Joint Supporters, CLF and NSTAR Electric, filed the Settlement Motion and Settlement noted above. The Settlement and Settlement Motion state that the Settlement is intended to resolve all issues relating to this proceeding (Settlement at 2, § 1.6, Settlement Motion at 1). Thus, for DOER, the Joint Supporters and CLF, the Settlement renders the Second Motion to dismiss moot.

rebuttal testimony far exceeds the Company's initial testimony, the three-day discovery period for the rebuttal testimony is too short to conduct any meaningful discovery (id. at 8). The Second Motion requests that, in order to fully consider the revised tariffs, the Department should dismiss the tariffs filed by NSTAR Electric on January 16, 2004, and suspend the revised tariffs, in order to allow for a full review of the revised tariffs (id. at 6-7).

In the alternative, the Second Motion requests that, should the Department not dismiss the tariffs, the Department should (1) disallow all testimony relating to the revised tariffs and order it stricken from the rebuttal filing, and (2) modify the procedural schedule to allow parties adequate time to review discovery information and cross-examine the rebuttal witnesses after such review (id. at 7-8).

2. NSTAR Electric Response

On April 26, 2004, NSTAR Electric filed an opposition to the Second Motion ("NSTAR Electric Response"). NSTAR Electric argues that there is no basis to: (1) dismiss the Company's January 16, 2004 tariff filing; (2) strike portions of the Company's rebuttal testimony; and (3) modify the existing procedural schedule (NSTAR Electric Response at 6).

The Company argues that its rebuttal filing addresses the concerns of various intervenors offered by their witnesses (id. at 3). NSTAR Electric asserts that the filing of illustrative tariffs in the context of rebuttal does not constitute a new rate filing under G.L. c. 164, § 94 (id. at 10). NSTAR Electric states that it offered the illustrative tariffs to assist the review by setting forth the specific terms that would apply to the recommendations made by NSTAR Electric in its rebuttal case (id. at 9-10). The Company contends that with the illustrative tariffs the parties will be able to propound reasonable discovery questions, conduct cross-examination, ask proper record requests and brief matters of concern (id. at 11). NSTAR Electric adds that, as a policy matter, imposing a prohibition on illustrative tariffs would act as a disincentive to providing clarity in Department proceedings and would frustrate the efforts of parties to defend their positions (or even concede certain positions) in adjudicatory proceedings (id. at 10-11).

3. Analysis and Findings

The standard of review for a motion to dismiss is stated in Section II.A.3. above. On April 21, 2004, NSTAR Electric, pursuant to the procedural schedule, filed its rebuttal testimony (Exhs. NSTAR-HCL-7 through 10; NSTAR-CPS-1 and 2; NSTAR-HSP-1 through 3). Consistent with the Massachusetts Administrative Procedures Act, the opportunity for NSTAR Electric to file a rebuttal case has been provided in the procedural schedule from the outset of this proceeding. See G.L. c. 30A, § 11(3). Thus, NSTAR Electric's rebuttal filing was not unanticipated. Further, the Department does not consider NSTAR Electric's filing of tariffs with its rebuttal case to constitute the filing of a new case that could trigger the statutory suspension period.

We agree with NSTAR Electric that these tariffs are in the nature of illustrative tariffs. That is, these tariffs support the positions of NSTAR Electric's witnesses offered in their rebuttal testimony. As such, the illustrative tariffs can serve to enhance the examination of NSTAR Electric's rebuttal case by making clearer the effects of the use of illustrative tariffs on NSTAR Electric's position. Indeed, the filing of an illustrative tariff during hearings can sometimes occur as a result of a record request by a party or by the Department staff. See Cambridge Electric Light Company/Massachusetts Institute of Technology, D.P.U. 94-101/95-36, at 74 (1995); U.S. Sprint Communications Co., D.P.U. 90-223, at 9 (1991); Western Massachusetts Electric Company, D.T.E. 97-120, at 167, n.118 (1999); Commonwealth Gas Company, D.P.U. 94-123, at 3 n.4 (1994). Accordingly, the Department denies the portion of the Second Motion pertaining to dismissing NSTAR Electric's January 16, 2004 filing and commencing a new rate case.

For the purpose of deciding on whether to grant the motion to dismiss, we construe as true NSTAR Electric's alleged facts that the tariffs filed with the rebuttal testimony were illustrative, prepared in response to intervenor testimony, and that NSTAR Electric did not file new tariffs for Department approval. We also note the extensive volume and scope of pre-filed testimony and discovery responses submitted by all parties to this proceeding in preparation for evidentiary hearings. Based upon the above, the Department cannot find beyond doubt that NSTAR Electric would be unable to prove any set of facts in support of its claims that the rebuttal testimony and illustrative tariffs were filed in response to the intervenor direct cases and the illustrative tariffs did not constitute a new rate filing. Accordingly, the Second Motion is denied.

As noted, the Second Motion requests that should the Department not dismiss the tariffs, the Department should (1) disallow all testimony relating to the revised tariffs and order it stricken from the rebuttal testimony, and (2) modify the procedural schedule to allow parties adequate time to review discovery information and cross-examine the rebuttal witnesses after such review. With respect to the alternative request to strike certain portions of the rebuttal testimony, we note that the rebuttal testimony was timely filed. Further, the procedural schedule initially did not provide for discovery on the rebuttal testimony. NSTAR

Electric, D.T.E. 03-121 (Hearing Officer Ruling (March 12, 2004)) (Department modifies procedural schedule to allow opportunity for intervenor answering testimony). However, at the pre-hearing conference, the Hearing Officer reopened discovery to allow parties an opportunity to issue information requests to the Company on the rebuttal testimony (Tr. at 26-29 (April 22, 2004)). In addition, one day for cross-examination of the Company's rebuttal witnesses was provided for in the hearing schedule (id.).[11] Upon review of the rebuttal testimony, we find that the testimony is relevant and responsive to the intervenor testimony, and assists the Department in determining the outcome of this case. Accordingly, we deny the request to strike certain portions of the rebuttal testimony as requested in the Second Motion.

III. THE PROPOSED SETTLEMENT

On June 4, 2004, NSTAR Electric, DOER, AIM, CLF, SEBANE and the Joint Supporters (together, the "Settling Parties") filed (1) a Joint Motion for Approval of Settlement Agreement ("Settlement Motion"); and (2) an Offer of Settlement Agreement ("Settlement"). The Settling Parties agree that the Settlement seeks to resolve all issues relating to this filing (Settlement Motion at 1; Settlement at 2, § 1.6). The Settling Parties seek approval of the Settlement in its entirety on the condition that if the Department does not approve the Settlement in its entirety by June 30, 2004, it shall be deemed withdrawn (Settlement Motion at 1; Settlement at 8, § 3.5). As noted in Section I, the Settling Parties later extended the approval-or- withdrawal date to July 23, 2004.

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[11] The subsequent discovery on the rebuttal testimony was extensive. The Department eventually conducted two additional days of evidentiary hearings, May 11 and May 13, 2004, to allow a further opportunity for parties to, among other things, cross-examine the Company's rebuttal witnesses (see Tr. 7, at 1,397; Tr. 8).

The Settling Parties agree that the following settlement standby tariffs go into effect on August 1, 2004: Boston Edison Company M.D.T.E. Nos. 136A (Settlement), and 138 (Settlement); Cambridge Electric Light Company M.D.T.E. Nos. 237C (Settlement), 238C (Settlement), 239C (Settlement), 254B (Settlement), and 255B (Settlement); and Commonwealth Electric Company, M.D.T.E. Nos. 337A (Settlement) and 228A (Settlement) (together, "Settlement Tariffs") (Settlement at 2-3, § 2.1).

The Settlement exempts certain on-site generators from the Settlement Tariffs (Settlement at 3, § 2.2). Specifically, the Settlement exempts: (1) any on-site generation between 250 kilowatts ("KW") and 1,000 KW that serves less than 30 percent of a customer's overall load (id. at 3-4, § 2.2(a), (c)); (2) on-site generation with a nameplate capacity of 250 KW or less (id. at 4, § 2.2(b)); (3) on-site generation that would be operational as of December 31, 2004 (December 31, 2005, for certain public schools which have binding financial commitments in place as of December 31, 2004) (id. at 4, § 2.2(d)); and (4) all on-site generation that qualifies as "renewable energy technologies" under G.L. c. 40J, § 4E(f)(1)[12] (id. at 4, § 2.2(e)). The Settlement would not exempt on-site generators that utilize fuel cells operating primarily on natural gas that are larger than 2,000 KW, or if the combined capacity of the fuel cells operating primarily on natural gas and that

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[12] G.L. c. 40J, § 4E(f)(1) lists the following as "renewable energy technologies": solar photovoltaic and solar thermal electric energy; wind energy; ocean thermal, wave, or tidal energy; fuel cells; landfill gas; waste-to-energy which is a component of conventional municipal solid waste plant technology in commercial use; naturally flowing water and hydroelectric; low emission, advanced biomass power conversion technologies, such as gasification using such biomass fuels as wood, agricultural, or food wastes, energy crops, biogas, biodiesel, or organic refuse derived fuel; and storage and conversion technologies connected to qualifying generation projects.

would otherwise be covered by the standby rates installed in the NSTAR Electric service territories after December 31, 2004, exceeds an aggregate of 10,000 KW (id.).

The Settlement contains certain terms that provide for adjustments to a customer's level of contract demand (id. at 5, § 2.2 (f)-(j)). The Settlement provides for a reduction in a customer's contract demand level if the customer agrees to a reduced level of self-generation, or a customer installs multiple self-generating units and uses at least one of those units for backup power (id. at 5, § 2.2(f), citing RR-DTE-23). The Settlement reduces the contract demand charges in the proposed rates by 15 percent for Cambridge and Commonwealth and 20 percent for BECo (June through September) and ten percent for BECo (October through May) (Settlement at 5, § 2.2(g)). The Settlement allows for adjusting the contract demand level where a customer replaces existing self-generation unit(s) (id. at 5, § 2.2(h)). The Settlement prescribes the circumstances and method that NSTAR Electric would use to provide non-firm standby service (id. at 5, § 2.2(i) (see RR-DTE-15)). The Settlement allows for customer nomination of the contract demand level based on good-faith negotiations that result in special contracts (id. at 5, § 2.2(j)).

The Settlement states that NSTAR Electric may not alter the availability terms of the standby tariffs before August 1, 2008 (id. at 6, § 2.3). However, the Settlement provides that underlying rates can change prior to August 1, 2008, if the proposed rate change is consistent with Department-approved rate changes that would otherwise apply to standby customers (id.). The Settlement adds that should the availability terms of the standby tariffs change at any time on or after August 1, 2008, any customer with on-site generation that comes on line before the effective date of such change, and that is not required to take service for the on-site generation under the availability terms of the Settlement Tariffs, will not be required to take standby service for that on-site generation because of a change in the availability terms (Settlement at 6-7, § 2.4).

In addition, the Settlement: (1) shall not constitute an admission by any party that any allegation or contention in this proceeding is true or false; and (2) shall not constitute a determination by the Department as to the merits of any issue raised during the proceedings (id. at 7, § 3.1). The Settlement also states that it establishes no principles and, except as to those issues resolved by approval of this Settlement, shall not foreclose any party from making any contention in any future proceedings, except for those issues that are stated in this Settlement as being resolved and terminated by approval of the Settlement (id. at 7, § 3.2).

The Settlement provides that the content of Settlement negotiations (including work papers and documents produced in connection with the Settlement) shall be confidential (id. at 7, § 3.3). The Settlement also states that all offers of settlement are without prejudice to the position of any party presenting such offer (id.). The Settlement provides that the content of Settlement negotiations are not to be used in any manner with these or other proceedings involving the Settling Parties (id.). The Settlement states that its provisions are not severable and that the Settlement is conditioned on its approval in full by the Department (id. at 8, § 3.4).

IV. STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department reviews the entire record as presented in a company's filing and other record evidence to ensure that the settlement is consistent with applicable law, and is consistent with the public interest. Boston Edison Company, D.P.U. 96-23, at 13 (1998); Berkshire Gas Company, D.P.U. 96-92, at 8 (1996); Boston Gas Company, D.P.U. 96-50, at 7 (Phase I) (1996). The resolution of issues by the parties to a proceeding does not relieve the Department of its obligation to conclude its investigation with a finding that a just and reasonable outcome will result. Essex County Gas Company, D.P.U. 96-70, at 5-6 (1996); Fall River Gas Company, D.P.U. 96-60, at 5 (1996).

V. POSITIONS OF THE PARTIES

A. Comments Opposed to the Settlement

1. NEDGC and TEC.

NEDGC, TEC, and certain members of NEDGC (American DG, Inc., Office Power L.L.C. and Tecogen Inc.) ("NEDGC et al.") assert that the proposed settlement rates do not represent the actual cost of standby service, and that Department approval of the rates will result in the improper deterrence of DG, which is contradictory to the goals established by the Department in D.T.E. 02-38 (TEC/NEDGC Comments at 5, 8).[13] NEDGC et al. maintain that the proposed standby service rates are not just and reasonable, and assert that full adjudication of the case would result in a finding by the Department that the proposed standby rates are unfair, unreasonable, inconsistent with the Department's ratemaking objectives, and accordingly, not in the public interest (id. at 10-12, 14). NEDGC et al. note that NSTAR Electric's otherwise applicable rates should not be used to develop standby rates because they

[13] TEC and NEDGC filed comments jointly. In addition, certain members of NEDGC filed separate comments, American DG, Inc., Office Power L.L.C. and Tecogen Inc.

are based on an outdated cost of service study, which increases the likelihood of cross-subsidization (TEC/NEDGC Brief at 2, 21–32).

NEDGC et al. claim that standby rates should account for both the costs and benefits of DG, as well as comply with Public Utility Regulatory Policy Act ("PURPA") requirements regarding rates charged to QFs (TEC/NEDGC Comments at 11). NEDGC et al. assert that the Department should require NSTAR Electric to perform a cost of service study for standby customers to develop an accurate revenue requirement and an accurate measure of marginal costs (id. at 11). NEDGC et al. maintain that the Department should resolve the issues regarding standby rates in a manner that conveys clarity and understanding, and provides a solid basis for principled design of standby rates in the future (id.).

NEDGC et al. assert three main reasons to reject the rates filed in the Settlement: (1) the rates are discriminatory; (2) the rates contain a Department-prohibited demand ratchet; and (3) the rates are anti-competitive and will discourage the installation of DG in NSTAR Electric's service territory (id. at 12-13).

NEDGC et al. state that the Company's case is based on a premise that the load characteristics of customers with DG are substantially different from customers without DG (TEC/NEDGC Brief at 16). NEDGC et al. assert that the testimony of Ms. Saunders and Mr. LaMontagne demonstrate that DG customers have load characteristics similar to those of all-requirements customers (id. at 19). NEDGC et al. also state that in Boston Edison Company, D.P.U./D.T.E. 85-266-A/85-271-A the Department rejected the Company's proposal to establish a separate rate for on-site generation customers, finding that the Company served customers with similar load characteristics under its general service rates, and that to treat customers with on-site generation differently would be unduly discriminatory (id. at 15). Similarly, NEDGC et al. state that customers seeking to install medium to large sized natural gas fired co-generation facilities will be most substantially and specifically affected by the proposed settlement rates (TEC/NEDGC Comments at 4). NEDGC et al. maintain that exemptions designed specifically for the Boston Public Schools and "renewable energy technologies" are discriminatory, and that other customers with similar load characteristics are not afforded such an exemption (id. at 6).

NEDGC et al. state that implementing a fixed level of demand ("contract demand") is inconsistent with Department precedent (TEC/NEDGC Brief at 2, citing Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36, at 47 (1995)). NEDGC et al. assert that in D.P.U. 94-101/95-36 the Department held that the use of contract demand is likely to cause over-recovery of distribution costs because, unless the customer has the same demand every month, the total billing demand will be less than twelve times the maximum billing demand (id. at 33, citing Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36, at 47-48 (1995)). NEDGC et al. also maintain that the demand ratchet contravenes PURPA requirements, which state that rates for standby service cannot be based on an assumption that forced outages or other reductions in QF output will occur simultaneously (id. at 32). NEDGC et al. assert that PURPA disallows a utility from charging one rate to QFs and another rate to customers with similar load characteristics (id. at 15).

NEDGC et al. state that the proposed rates are anti-competitive and will discourage the installation of DG in NSTAR Electric's service territory for the following reasons: (1) the proposed rates will impose higher costs on customers with DG than they would pay under the otherwise applicable rates; (2) the proposed rates are complex in design and difficult to understand; and (3) the notice periods regarding termination of service or switching to non-firm service have long lead times which would have a negative impact on customers (TEC/NEDGC Brief at 35-37).

NEDGC et al. maintain that the Settlement contravenes the policies of the Commonwealth, which recognize that DG can bring benefits to all Massachusetts energy consumers, such as increased competition, reduced market prices (particularly in load pockets), reduced air pollution, increased fuel diversity, and relieved congestion on the transmission system (TEC/NEDGC Brief at 5-6). In addition, NEDGC et al. state that reliable DG can enable a distribution company to defer transmission and distribution capacity expansion (TEC/NEDGC Brief at 5-6).

NEDGC et al. conclude that the Settlement was designed to appease a few parties in the proceeding, but not those parties that will be most directly affected by the settlement rates (TEC/NEDGC Comments at 4). Finally, NEDGC et al. recommend rejection of the Settlement because the proposed rates fail to take into account the benefits that DG may offer to distribution companies such as reduced market prices, reduced air pollution and increased fuel diversity (TEC/NEDGC Brief at 2, 5).

2. Western Massachusetts Industrial Customers Group

WMICG argues that the Department should reject the Settlement because it is not in accord with existing Department precedent and regulations regarding QFs, and that the Settlement would create discriminatory rates (WMICG Comments at 5). WMICG notes that the Settlement may exclude several DG projects and that others would be arbitrarily subjected to the standby rates set forth in the Settlement Tariffs (id. at 1). WMICG states that the Settlement creates undue discrimination, as the Company has neither demonstrated cost justification nor provided evidence of a differentiation in the usage characteristics of DG that would necessitate a new rate class (id. at 2-3).

WMICG argues that the contract demand provision in the Settlement is a demand ratchet, which is inconsistent with Department precedent (id.). WMICG states that to design a rate based upon otherwise applicable rates and a contract demand creates discriminatory rate treatment between DG and non-DG customers (id. at 4). WMICG adds that neither NSTAR Electric nor the Settlement present evidence that justifies adoption of a demand ratchet (id. at 3). In addition, WMICG asserts that the Company has presented no evidence of any cross-subsidy that exists between DG customers and other customers (id. at 3-4).

WMICG argues that Department QF regulations require the Company to supply a QF under rate schedules applicable to all customers, regardless of whether they self-generate (WMICG Comments at 4, citing 220 C.M.R. § 8.06(1)). WMICG concludes that QFs must be excluded from standby rates and be allowed to purchase service under rate schedules applicable to customers that do not generate their own power (id. at 5).

3. Wyeth Pharmaceuticals, Inc.

Wyeth asserts that the Settlement Tariffs are discriminatory because they impose higher charges on customers with DG for the same instantaneous delivery service provided to all customers, and that Department precedent prohibits discriminatory rates that treat customers with similar loads differently (Wyeth Comments at 6-7, citing, Boston Edison Company, D.P.U. 92-92, at 58 (1992); Exh. TEC-1, at 3). Wyeth adds that the Settlement Tariffs utilize a contract demand ratchet that overcharges DG customers, and that the Department has rejected demand ratchets because they do not promote energy conservation and can unfairly impose higher costs on certain customers (id. at 7, citing Cambridge Electric Light Company/MIT, D.T.E. 94-101/95-36 (1995)).

Wyeth also claims that the Settlement Tariffs are anti-competitive and suggests that the Department design standby service rates that support the efficient operation of DG and customer choice (Wyeth Comments at 7-8). Wyeth states that DG customers should have the option to contract for a specific capacity relevant to their needs and bear the costs and risks associated with that business decision (id. at 8). Wyeth asserts that the Settlement provision requiring a utility-owned meter to be installed to meter the output of a customer's on-site generation is objectionable and invasive, as well as inconsistent with the Department's directive to address the issue of meter-ownership in the DG Collaborative (id. at 8-9). Wyeth notes that the grandfathering provision in the Settlement is equitable and appropriate as it exempts customers that invest in distributed generation prior to the adoption of the tariffs (id. at 9). Wyeth urges the Department to reject the proposed Settlement and continue its consideration of standby rate design through the collaborative process in D.T.E. 02-38 (id. at 11).

B. Comments Generally Supporting the Settlement

1. The Attorney General

The Attorney General recommends approval of the Settlement only if the tariffs are temporary, and concludes that NSTAR Electric's next rate case is the appropriate time to develop a more permanent rate design (Attorney General Comments at 8-9, 13). The Attorney

General concludes that the Settlement is "adequate" in the short term to meet the goals of establishing standby rates that do not inappropriately discourage the development of on-site generation that will alleviate or avoid transmission or distribution constraints, or the installation of new transmission or distribution facilities (id. at 8).

The Attorney General explains that the Department approved the currently effective rates based upon a cost of service study, deeming the rates to be appropriate in terms of interclass rate-setting and rate design at the time they were approved (id. at 8-9, citing Tr. 1, at 91). The Attorney General notes that the Company has since changed from a vertically integrated generation, transmission and distribution company into a distribution-only company (id. at 9). The Attorney General states that, in 1995, as part of electric industry restructuring, the NSTAR Electric companies were required to "unbundle" their rates and "backed into" the distribution rates using 1995 information (id., citing Tr. 2, at 333-339).

The Attorney General points out that the provision of the Settlement that establishes a permanent exemption for certain customers that install on-site generation by August 1, 2008, would come at the expense of other customers in the class and may result in unjust and unreasonable rates (id. at 8-9, citing Settlement at 6, § 2.4). The Attorney General concludes that this provision would be contrary to Department precedent that allows customers to be grandfathered only until a company's next general rate case (id. at 9., citing Commonwealth Electric Company, D.P.U. 93-42, at 36 (1993); Fitchburg Gas and Electric Light Company, D.T.E. 98-51, at 150 (1999)).

The Attorney General argues that the Department should require NSTAR Electric to recover transition charges as a fixed charge component of the Settlement Tariffs rather than on the proposed as-used basis (id. at 10-11, citing G.L. c. 164. §§ 1G (b) and (e)). The Attorney General suggests that the Department also require that the Settlement Tariffs include a contract demand transmission charge (id. at 10, n.10). The Attorney General argues that exclusion of transmission and transition charges from the proposed contract demand based charges results in a subsidy of standby customers by other customers (id. at 11, n.14). The Attorney General states that, in order to avoid under-recovery of utility costs from standby customers, the Department should consider an administrative fee, consistent with those presently in Cambridge's current standby tariffs and certain NSTAR Electric special contracts (id. at 11, n.14, citing Exh. DTE 2-1; M.D.T.E. No. 237C).

The Attorney General proposes that the Department require all electric companies to begin collecting data that would identify on-site generation characteristics to support a separate class or classes, or support the inclusion of on-site generation customers in the otherwise applicable rate class in the next cost of service studies used to design a company's rates (id. at 12). The Attorney General also recommends that the Department order NSTAR Electric to explain the "percentage of load served" exemption in the tariffs, as well as install meters to monitor the total load of any DG customer who does not qualify for net metering (id. at 12, n.16).

2. The Electric Distribution Companies

FG&E, MECo and WMECo do not oppose the Settlement (FG&E Comments at 2; MECo Comments at 2; WMECo Comments at 1). FG&E argues that the Settlement is consistent with NSTAR Electric's original proposal, with a more liberal application of thresholds and exemptions, and is also consistent with the policy goals identified by the

Department for the calculation of standby service rates (FG&E Comments at 2). FG&E states that the Department should not issue an order in this proceeding that would apply to all electric companies, because each distribution company has its unique circumstance and rates should be determined on a case-by-case basis (id.).

FG&E asserts that the method to procure loads for default service should be revised because of the high volatility of load from customers that self-generate and require standby service (id. at 3-4). FG&E suggests two alternatives: (1) to conduct a separate solicitation for customers that self-generate and require more than three megawatts ("MW") of standby service; and (2) to categorize the different loads under which a default service price is solicited based on switching rules and procurement strategies instead of rate class assignment (id. at 4-5).

MECo states that the approval of the Settlement should not preclude other distribution companies from proposing standby service tariffs that include rate structures and other provisions that may be more appropriate for such distribution company's situation (MECo Comments at 2).

3. Keyspan

Keyspan states that the Settlement Tariffs balance the Department's rate structure objectives with the goal of removing barriers to the implementation of DG (Keyspan Comments at 1). Keyspan notes that the Settlement Tariffs enable a utility to recover its distribution costs (id.). In addition, Keyspan states that the availability clause in the Settlement Tariffs addresses the concerns of certain businesses that are in the process of installing DG or seeking financial commitments for DG projects (id.). Keyspan adds that exempting certain types and sizes of DG facilities will likely encourage those entities to install DG (id. at 1-2).

C. Comments by the Settling Parties

1. NSTAR Electric

NSTAR Electric claims that the Settlement Agreement and Settlement Tariffs are reasonable and consistent with the Department's most recent statement of the standby service ratemaking principles (NSTAR Electric Comments at 13-14, citing, Order Opening Investigation into Distributed Generation, D.T.E. 02-38, at 4 (2002)). NSTAR Electric argues that those principles, stated in D.T.E. 02-38, mirror the Department's traditional rate design principles of fairness and economic efficiency (id. at 14).

In addition, NSTAR Electric states that the Settlement Agreement and Settlement Tariffs include unique elements that are the product of extensive negotiations among diverse parties in the instant case (id. at 19). First, the Settlement Tariffs extend the period of time during which a customer may complete the installation of self-generation without being required to take standby service under the Settlement Tariffs (id. at 20). NSTAR Electric states that this provision provides generous notice for projects that are currently in progress, given that the Company's standby tariff filing was made in October 2003 (id.). Second, customers with on-site generating units that use "renewable energy technologies," as that term is defined in G.L. c. 40J, § 4E(f)(1), are allowed to take service under the otherwise applicable rate schedules (id. at 21). NSTAR Electric states that this provision provides tangible support for the important public policy objective of the development and promotion of renewable energy projects in the Commonwealth (id. at 21-22). Third, the Settlement Tariffs provide for and identify the availability of non-firm service and the general conditions that must be met for obtaining such service (id. at 23). NSTAR Electric claims that this non-firm service provision is in the public interest because it identifies the availability of an alternative service and clearly describes the conditions that must be met to qualify for such service (id. at 22-23). For example, should local distribution capacity become unavailable to serve the customer's standby load, the Company will require the customer to interrupt its standby load (M.D.T.E. No. 138 (Settlement) at 6). Fourth, the Settlement Tariffs include a provision for customer-nominated contract demand (id. at 23). NSTAR Electric claims that such a provision serves the public interest by providing alternatives to customers who may wish to proceed under a special contract, subject to review and approval by the Department (id. at 23-24).

Regarding the cost of standby service, NSTAR Electric states that its distribution system is built to serve all firm customers, including standby customers, and must be ready to serve all customers (id. at 15). NSTAR Electric reasons that since it must construct its distribution circuits to be of sufficient size to meet the peak load of the internal requirements of all customers, the appropriate standby rates must be comparable with the charges of the otherwise applicable continuous-service rate schedules (id.). NSTAR Electric adds that calculating the standby rates based on those rates charged to customers who take all-requirements service is equitable and economically efficient because it prevents cross-subsidization among customers and sends more accurate price signals (id. at 15).

Similarly, NSTAR Electric maintains that the Settlement Tariffs are not unduly discriminatory, as they are based on the existing distribution rates (id. at 25-26). Moreover, NSTAR Electric notes that the Settlement Tariffs reduce the contract demand charges by approximately 15 percent, on average, from the Company's proposed charges (id. at 15, 25-26). NSTAR Electric states that this reduction takes into account differing views among the parties with respect to the "benefits" of on-site generation, which as they materialize, would reduce a distribution company's cost to serve (id. at 41).

NSTAR Electric claims that although the Settlement Tariffs do not apply to certain customers with on-site generation from renewable resources, any cost shifting would be insignificant because as a result of solar and wind technologies, for example, there would inevitably be an absence of generation each month and those DG customers would be charged an as-used demand rate during those times of non-generation (id. at 17). In the case of on-site generation of 250 KW or less, NSTAR Electric states that there will be no cross subsidization because the Company does not explicitly adjust the size of its distribution system based on the relatively small standby service requirements of those customers (id. at 17-18).

NSTAR Electric also states that the unsettled status of policies for designing standby rates for distribution companies post-electric-restructuring in Massachusetts, as acknowledged by the Department in D.T.E. 02-38, completely belies the argument that Department precedent bars approval of the Settlement Tariffs because of the inclusion of a demand ratchet (id. at 39). The Company asserts that the Settlement Tariffs include a contract demand provision because it would be unreasonable for NSTAR Electric to assume that a self-generation customer would have the same metered demands before and after the installation of self-generation (id. at 26). NSTAR Electric states that billing self-generation customers based on metered demand rather than contract demand would result in an under-collection of distribution revenues because self-generation customers use the distribution system in an infrequent and intermittent fashion (id. at 26-27, citing Hull Municipal Light Plant, D.P.U. 87-19-A at 42 (1990); American Hoechest Corp. v. Department of Public Utilities, 379 Mass. 408,411 (1979)). The Company cites to several examples where the Department has approved standby rates with contract demand charges (NSTAR Electric Comments at 39, citing Boston Edison Company, D.P.U. 92-92, at 58-63 (1992); Nantucket Electric Company, D.P.U. 88-161/168, at 226-227 (1989); and Western Massachusetts Electric Company, D.P.U. 92-290 (1992)). The Company asserts that without an alternative collection method, such as contract demand, the resulting cost allocation would be discriminatory against non-self-generation customers because the Company would be under-recovering distribution revenues from self-generating customers (NSTAR Electric Comments at 29-30).

NSTAR Electric asserts that the contention by NEDGC et al. and WMICG that the load characteristics of customers with on-site generation are the same as those of continuous-use customers relies on a very small sample of data and, accordingly, lacks adequate evidentiary support (id. at 29).

The Company asserts that the Settlement Tariffs are fully consistent with the requirements of PURPA and with federal and state regulations (id. at 31). NSTAR Electric maintains that the Settlement Tariffs do not violate PURPA's requirement that rates charged to QFs cannot be discriminatory against such customers as compared to continuous-use customers with similar load characteristics, because standby customers are being charged rates that are based on the same cost of service study that serves as the basis for the rates charged to other customers in the applicable rate classes (id. at 31). Similarly, NSTAR Electric responds that its Company's planning criteria take account of the fact that the capacity required to serve

QFs, like all other self-generating customers on its distribution system, may be unavailable at the time of system peak (id. at 34). NSTAR Electric states that these planning criteria are firmly grounded in the Company's distribution system planning and the associated construction necessary to provide reliable electric service (id. at 34).

The Company notes that PURPA does not require that QFs receive service under the otherwise applicable rate schedules (id. at 34). NSTAR Electric states that PURPA contemplates and requires that standby rates be based on traditional cost of service concepts, and that the Settlement Tariffs comply with this requirement (id. at 36).

In response to the Attorney General's concern regarding the grandfathering provision included in the Settlement Agreement, NSTAR Electric states that this provision serves to protect customers who entered into financial commitments based on reasonable assumptions about the applicability and structure of standby rates, and that protecting these customers from changes in standby rates is warranted and in the public interest (id. at 42). The Company notes that the cases cited by the Attorney General (D.P.U. 93-41 and D.P.U. 98-51) do not establish a Department policy against the type of provision included in Section 2.4 of the Settlement (id. at 42, n.25).

With regard to the Attorney General's argument that transition cost recovery should be included in contract demand charges, the Company notes that there is no record evidence to support such a claim (id. at 43). Finally, NSTAR Electric states that although the Attorney General's recommendation to collect data on DG operating in its service territories is outside of the scope of the Settlement Agreement, the Company intends to monitor the development of on-site generation in its service territories through August 1, 2008, and will present that information during a rate case (id. at 44).

2. DOER

DOER states that the Settlement Tariff rates should remain in effect only until NSTAR Electric's next general rate case when the Company will provide a fully allocated cost of service study (DOER Comments at 2). DOER argues that the Settlement Tariffs should not include provisions for recovery of transition costs or transmission charges and states that the Settlement complies with the Restructuring Act (see G.L. c. 164, section 1G(g)) (id. at 3). DOER maintains that these charges should be included in the supplemental service tariffs instead of the standby tariffs, which bills customers based on their contract demand (id. at 2-3). According to DOER, imposing a transition charge based on the contract demand rather than actual usage would be the equivalent of an exit fee, because the customer would be paying for the ability to reduce its usage of the system (id. at 3).

DOER states that the cost to serve on-site generation customers should be determined in the context of the next general rate case (id.). DOER suggests that no determination be made at this time about the appropriate treatment of cost recovery attributable to discounts and excluded customer groups until a fully allocated cost of service is available (id. at 3-4). DOER also mentions that the terms of the Settlement leaves these issues unresolved (id.).

DOER states that the Settlement supports the policy goals of the Commonwealth (id.). DOER asserts that the Settlement recognizes the importance of facilitating the development of DG through the modification of the availability provisions in the Settlement Tariffs to exempt renewable projects of any size, except as limited for natural gas-fired fuel cells (id. at 5).

DOER states that the Settlement supports the goals of the Commonwealth to encourage renewable energy at a reasonable cost to consumers (id.). Furthermore, DOER agrees with the statement of NEDGC et al. regarding the Commonwealth's policy goals related to DG, but does not agree that these goals should be pursued solely through standby rates, and without considering the rate impacts on other customers (id.).

Contrary to the Attorney General's position, DOER believes there should be no declaration about future cost recovery or cost shifting in this proceeding (id. at 6). DOER shares the Attorney General's concern about potential impacts on other customers from serving DG customers, but notes that there is insufficient information to prove this concern (id.). DOER suggests that the Company perform studies that analyze the impact of the on-site generation on the distributions system (id.). DOER also suggests that the data gathering process include a pilot program similar to the one conducted by MECo in Brockton (id., citing Exh. DOER-NG-1-5). DOER provides an example of such a pilot program and mentions that the Company will have no objection to this proposal (id. at 6, 9-10). DOER suggests that such a pilot program should be filed by April 2005 (id. at 6).

3. CLF

CLF maintains that the Settlement reaches a reasonable balance given the uncertainty over the net costs and benefits, and asserts that because the Settlement enables the expansion of renewable energy technologies, it is consistent with the public interest (CLF Comments at 4, 6).

CLF states that although ratepayer equity is a significant component of the "public interest," the public also has a strong interest in the benefits that DG provides, including increased electricity reliability, increased energy efficiency, and improved air quality (id. at 4-5). CLF asserts that there is a statutory direction to all state agencies to consider the impact on the natural environment of projects such as DG, and states that the deployment of efficient DG results in environmental and social value (id. at 5). CLF maintains that there is no evidence that the exemptions listed in the Settlement will result in any subsidy or cost shifting to other ratepayers (id.).

CLF asserts that the Department has long held that rate structures that do not encourage reduced electricity consumption, and the resulting environmental benefits, will be rejected (id. at 6). CLF asserts that the Department should continue fostering incentives for socially and environmentally beneficial behavior through its ratemaking policies (id.).

4. SEBANE

SEBANE urges approval of the Settlement on the basis that the Settlement is beneficial to customers who install renewable DG and small DG facilities (SEBANE Comments at 3). SEBANE maintains that the Settlement is in the public interest because it exempts customers that install renewable DG from standby charges (id., citing G.L. c. 40J, § 4E(f)).

SEBANE states that renewable DG creates economic benefits for ratepayers through its operation during times of system peaks, which helps moderate wholesale electricity prices (id. at 3-5). SEBANE also maintains that renewable DG reduces the cost of compliance with the Renewable Portfolio Standard ("RPS") and states that renewable DG creates environmental benefits through reduced emissions and pollutants, thus assisting in meeting Clean Air Act requirements and climate change goals (id. at 3-6). Similarly, SEBANE asserts that the standby rate exemption for customers who install renewable DG supports Massachusetts state policies discussed in the General Laws, including the Massachusetts Renewable Trust, RPS, and various tax exemptions (id. at 6).

SEBANE maintains that "it is undisputed in the record that DG below a certain size is too small to have an impact on the distribution system," and that "DG below a certain percentage of the customer's peak load should be exempt from standby rates. . . because these DG customers do not impose extraordinary costs on the distribution system. . ." (id. at 6-7).

5. Associated Industries of Massachusetts

AIM supports approval of the Settlement and urges the Department to use the Settlement Tariffs as a template for other utilities (AIM Comments at 1). AIM claims that the Settlement strikes a reasonable balance needed to promote DG, to recognize the value of renewables, and not to create an unfair burden on customers that do not install or benefit from DG (id.). AIM states that, given that all signatories to the Settlement represent very diverse interests, this "should signal the Department the importance of continuing to move this difficult and complex issue forward" (id.).

VI. ANALYSIS AND FINDINGS

A. The Settlement

1. Introduction

The Department notes that the Settlement was the product of negotiations among diverse parties with wide ranging interests. For the reasons discussed below, the Department finds that the Settlement is consistent with applicable law, is consistent with the public interest, and will result in a just and reasonable outcome.

2. Cost of Service Study

Some parties argue that the Settlement Tariffs should not be approved, absent a new cost of service study for standby service customers (see TEC/NEDGC Brief at 13). In the context of this case, we do not find the lack of a new cost of service study to be a filing deficiency. The Settlement does not result in a general distribution rate increase pursuant to G.L. c. 164, § 94. Instead, the rates charged under the Settlement Tariffs are based upon Department approved rates that have been determined to be just and reasonable pursuant to G.L. c. 164, § 94 (Exh. NSTAR-HCL-1, at 16). See Boston Edison Company, D.T.E. 96-23, at 25-32 (1998); Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric Company, D.P.U./D.T.E. 97-111, at 38-40 (1998).

While cost of service is a well-recognized basis for utility rate structures, it need not be the sole criterion; other factors may justify a separate classification. American Hoechest Corp. v. Department of Public Utilities, 379 Mass 408, 411 - 412 (1980); Monsanto v. Department of Public Utilities, 379 Mass 317, 320 (1979). A cost of service study for all customer classes is required in a general rate case. Such a study is not conventionally required in occasional tariff filings between general rate cases. See Attorney General v. Department of Telecommunications and Energy, 480 Mass 256, 270 (2002) (correction of distribution companies' retail distribution rates did not require rate investigation); Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, D.T.E. 99-19, at 22 (1999); New England Telephone and Telegraph Company d/b/a/ NYNEX, D.P.U. 94-50, at 274 (1995) (citing June 14, 1994 Interlocutory Order at 22). This Settlement concerns only certain classes of NSTAR Electric customers whose cost to serve has not changed. We find that it is reasonable not to require the Company to perform a new cost of service study because the Settlement establishes rates based upon previously approved rates.

3. Consistency with QF Regulations

Some parties have argued that the Settlement Tariffs are inconsistent with federal and state QF regulations (WMICG Comments at 5, citing 220 C.M.R.§§ 8.06 (1)). As we explain below, we find there is no inconsistency.

QFs are a class of generating facilities established by PURPA and regulations promulgated by FERC. See 18 C.F.R. §§ 292.101 et seq. Pursuant to PURPA, FERC is authorized to promulgate rules that encourage cogeneration and small power production, including rules that require electric utilities to purchase power from, and sell power to, QFs. 16 U.S.C. § 824a-3(a). Section 210(f) of PURPA delegates to states the authority to determine QF rates and implement FERC regulations. Fact-based determinations and PURPA enforcement issues are within the province of the states. Massachusetts Institute of Technology, 74 FERC ¶ 61,750 (1996) (citations omitted). The Department has promulgated rules that, among other things, govern the rates, terms and conditions of sales of electricity by distribution companies to QFs. 220 C.M.R. §§ 8.00 et. seq.; Qualifying Facilities Rulemaking, D.T.E. 99-38 (1999).

Rates for QFs, "(i) shall be just and reasonable and in the public interest; and (ii) shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility." 18 C.F. R. § 292.305(a)(1). We find that the Settlement Tariffs are based upon rates that are just and reasonable. The Settlement Tariffs apply to both QF and non-QF customers.[14] Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 867 (1997) ("[W]e agree with the [D]epartment that the imposition of a customer service charge that applies to a broad class of customers, and that does not single out QFs for unlawful discriminatory treatment, does not violate the State's PURPA regulations"). Therefore, the Settlement Tariffs do not single out QFs for unlawful discriminatory treatment and are consistent with FERC and Department QF regulations.

4. Demand Ratchet and Undue Discrimination

a. Demand Ratchet

Some parties argue that the Settlement Tariffs' use of a contract demand charge that includes a demand ratchet, as opposed to an as-used demand charge, is contrary to Department precedent (TEC/NEDGC Brief at 32-34). See D.P.U. 94-101/95-36, at 46-50. Every decision in a particular proceeding does not become irreversible in the manner of judicial decisions constituting res judicata. Boston Gas Company v. Department of Public Utilities, 376 Mass 92, 104 (1975). The requirement of reasoned consistency means that any change from an established pattern of conduct must be explained, but it does not mean that the Department may never deviate from its original position. Town of Hingham v. Department of Telecommunications and Energy, 433 Mass 198, 213 (2001); Robinson v. Department of Public Utilities, 416 Mass 668, 673 (1993).

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14 Because all distribution companies have divested themselves of their generating facilities pursuant to their restructuring plans, sales of electric power by distribution companies to QFs are the same as to all other customers, either through standard offer or default service prices. G.L. c. 164, §§ 1A; 1B (b) and (d); see D.T.E. 99-38, at 2-5.

In the past, the Department has found demand ratchets to be inappropriate because they establish an incentive for customers to consume each month their contract demand amount, and thereby distort incentives to conserve and could unfairly impose higher costs on certain customers. See D.P.U. 94-101/95-36, at 50 citing Massachusetts Electric Company, D.P.U. 92-78, at 188 (1992); and Western Massachusetts Electric Company, D.P.U. 86-280-A, at 196 (1987). However, the Department notes that establishing rate design for standby service is unsettled. See Distributed Generation, D.T.E. 02-38, at 2 (2002). In D.P.U. 94-101/95-36, at 47, the Department acknowledged that as a result of electric restructuring, the pricing of standby rates may need to be modified. With the advent of electric restructuring, rates have been unbundled. The rate unbundling process has resulted in a reduction to the demand charges and an increase to the energy charges of customers' electric bills (RR-DTE-25). Thus, the incentive to conserve is now provided more through increased energy charges and less through the demand charges (Exh. NSTAR-HCL-7, at 18). Moreover, much of the Department's stance adverse to demand ratchets as discouraging conservation dates from the pre-restructuring era, when conservation, especially at peak hours, tended to postpone costly additions of generating capacity and other plant to rate base (demand ratchets were an accepted feature of ratemaking until 1984). Western Massachusetts Electric Company, D.P.U. 84-25, at 199 (1984). With the divestiture of generating capacity, that rationale has largely dissipated.

The Settlement Tariffs with a demand ratchet is based upon record evidence that the Company incurs the same distribution costs to serve customers that need standby service as it does to serve continuous-use customers (Exh. NSTAR-HCL-1, at 16-19).[15] The change in the billing determinants through which to recover distribution costs may be warranted here because standby customers use distribution services infrequently and intermittently. Therefore, such a demand ratchet may not unfairly impose higher costs on certain customers with on-site generation. We further address this issue below on undue discrimination. The Department finds that the use of a contract demand that includes a demand ratchet is a reasonable resolution of this issue in the context of this Settlement.[16]

b. Undue Discrimination

i. Introduction

Some parties argue that treating customers with on-site generation differently than other customers is unduly discriminatory (TEC/NEDGC Brief at 14). In order to show unconstitutional discrimination in Department rate setting, both Massachusetts and federal courts apply a rational relationship test.

> The Department's action will be accorded all rational inferences of regularity and accuracy. The party challenging the action must affirmatively show that no factual situation can be conceived that will support the reasonableness of the differential treatment of like entities.

Massachusetts Electric Company v. Department of Public Utilities, 376 Mass. 294, 312 (1978), citing New Orleans v. Dukes, 427 U.S. 297, 96 S. Ct. 2513 (1976). Establishing rate classes and assigning customers to those rate classes is per se an exercise in

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15 The Settling Parties agreed to establish rates that include a demand ratchet, but the ratchet is mitigated by other Settlement provisions (Settlement at 5-6, §§ 2.2 (f) - (j)).

16 The Department's acceptance of the use of a demand ratchet in the Settlement Tariffs does not set precedent for future filings whether ultimately settled or adjudicated. See Massachusetts-American Water Company, D.T.E. 00-105, at 5 (2001).

discrimination. The question is whether a rate is unduly or irrationally discriminatory. The party challenging the legality of a Department order on the grounds of unconstitutional discrimination has the burden to prove that the Department's decision was undue or irrational discrimination. Massachusetts Oilheat Council v. Department of Public Utilities, 418 Mass 798, 804 (1994); see Boston Gas Company, D.P.U. 92-59, at 49-51 (1993); Massachusetts Electric Company, D.P.U. 19736, at 70 (1978).

The Settlement Tariffs contain a number of reasonable provisions: (1) an extended period of time over which a customer may complete the installation of self-generation to be exempt from taking service under the Settlement Tariffs (Settlement at 4, § 2.2(d)); (2) an exemption for customers who install on-site generating units that use renewable energy technologies (id., § 2.2(e)); (3) an option for a customer who self-generates to negotiate non-firm service (id. at 5, § 2.2(i)); (4) an option that allows a customer who self-generates to nominate its contract demand level (id. at 5-6, §§ 2.2 (f),(j));[17] and (5) provisions that set contract demand rates at levels that are 80 to 90 percent of NSTAR Electric's initially proposed contract demand charges (id. at 5, § 2.2(g)).

We first discuss the Settlement's exemption provisions. We next discuss the options under the Settlement for DG customers to take non-firm service, pay a contract demand charge, or negotiate a contract demand level. We lastly explain why the Settlement Tariffs are not unduly discriminatory.

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17 This provision also provides the DG customer with the option to contract for the supplemental demand level (Settlement at 5-6, § 2.2 (j); see M.D.T.E. No. 138 (Settlement) at 6).

ii. Exemptions from the Standby Tariffs

The Settlement exempts smaller and/or intermittent DG facilities from the Settlement Tariffs (Settlement at 3-4, §§ 2.2(a)-(c)). The Department notes that this provision will serve to promote the construction of small and/or intermittent DG facilities in NSTAR Electric's service territory. As indicated on the record, the exemption of these facilities will have little financial impact because NSTAR Electric's distribution system planning does not account for changes in load below one MW (Exh. NSTAR-CPS-1, at 4-5; Tr. 7, at 1345-1348).

By exempting from the Settlement Tariffs on-site generation that becomes operational by December 31, 2004,[18] the Settling Parties have recognized that customers may be in various stages of DG implementation and this exemption allows those customers to complete projects and be charged based on the Company's current rates. This provision will allow customers to continue their plans to self-generate without the need to change their assumptions concerning the rates they would be charged for standby service (Exh. JS-DH-1, at 8).

The exemption provision pertaining to those DG facilities that use renewable energy technologies furthers Department policies that encourage the use of those energy resources. See Massachusetts Electric Company, D.T.E. 03-55 (Terms and Conditions for GreenUp Service, M.D.T.E. No. 1067-A) (2003). The Department notes that such an exemption will likely result in an increase in the number of DG facilities using renewable energy technologies in NSTAR Electric's service territory. This exemption could also serve to increase fuel diversity, as well as encourage the development of new renewable energy projects that could make more renewable energy credits available to retail electric suppliers in order to meet their

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[18] This exemption extends to December 31, 2005, for certain public schools with binding financial commitments in place as of December 31, 2004 (Settlement at 4, § 2.2(d)).

obligations under G.L. c. 25A § 11F. See 225 C.M.R. §§ 14.00 et seq. The Settlement's benign attitude towards development and deployment of renewable energy technologies is consonant with the public policy established by the General Court. G.L. c.164, § 1, 1G(g). That consonance is an important consideration in our allowance of the Settlement.

iii. Non-Firm Service and Contract Demand

The Settlement provision establishing the option of non-firm standby service allows a customer to take less than firm service, provided the customer agrees to certain operational requirements for its DG facility. The Department finds that this provision is fair and reasonable because it provides DG customers that carefully manage their load the opportunity for lower prices, while allowing NSTAR Electric to recover the cost to serve these customers (RR-DTE-17; Tr.7, at 1362).

The provision of the Settlement Tariffs that prices contract demand charges at 80 to 90 percent of the Company's initially proposed contract demand charges recognizes the legislative and Department mandates to alleviate or avoid transmission or distribution constraints by encouraging the installation of DG facilities. See G.L. c. 164, § 1 ("Distributed Generation" definition); see Investigation re: Distributed Generation, D.T.E. 02-38-B at 40 (2004); Competitive Market Initiatives, D.T.E. 01-54, at 11 (2001).

The Settlement provision that allows a customer to negotiate its contract demand level based on the expected performance of the DG facility, rather than on the nameplate capacity of that DG facility, is fair and reasonable. It provides DG customers with an ability to efficiently manage their standby service requirements, and it offers the potential to lower demand costs on the NSTAR Electric distribution system (Settlement at 5-6, § 2.2 (j); Exh. NEDGC-3, at 8; Tr. 3, at 426; Tr. 5, at 826).

iv. DG Customers on Standby Service

Where a customer uses an on-site generator to serve all or a portion of its total electrical load, but may still call on the local distribution company to serve some or all of its power needs on short or no notice, the local distribution company must reserve sufficient distribution capacity to meet that contingent service requirement. There is a cost in providing that insurance of service (see Exh. NSTAR-CPS-1, at 8). The Company has provided evidence that generation by a DG facility of one MW or above would be significant as a matter of planning and cost because contingent demand on this scale must be included in the Company's distribution system planning (Exh. NSTAR-CPS-1, at 4-5; Tr. 7, at 1345-1348). Under current rates, all customers, including DG customers, pay only for the amount of distribution capacity they actually use, even though the cost to serve the customer is the cost of the capacity the Company has reserved. DG customers that take service infrequently and, generally, without notice do not provide sufficient revenues to the Company to cover the costs to serve them, and therefore are being subsidized by the other customers (Exh. HCL-1, at 17).[19] The Department's ratemaking policy requires cost responsibility to follow cost incurrence. See, Boston Gas Company, D.P.U. 96-50 (Phase I) at 133-134 (1996); Boston Gas Company, D.P.U. 93-60, at 331-337, 410, 423 (1993); Bay State Gas Company, D.P.U. 92-111, at 54, 283-284, 311-312 (1992); Boston Edison Company, D.P.U. 1720, at 114 (1984). The cost to serve standby and continuous-use customers is the same

[19] Cross-subsidization results when customers are not responsible for all the costs to serve them.

(Exhs. NSTAR-HCL-1, at 16: NSTAR-CPS-1, at 13), but the potential for rate recovery of the cost of service is quite disparate. The ability to recover costs from standby customers requires a different approach (Exh. NSTAR-HCL-7, at 3-4; NSTAR-HSP-2, at 5; NSTAR-HCL-1, at 16-17; Tr. 2, at 288-289, 311-312). To comply with the Department's ratemaking policy, standby rates must be designed so that the costs of providing standby service are recovered from standby customers and not shifted to other customers. Use of monthly metered demand charges will not allow the distribution company to recover costs incurred to provide the local distribution facilities needed to "stand by" for the DG customer (Exh. NSTAR-HSP-1, at 9). Therefore, within the resolution of this case, we find that the rate structure of the Settlement Tariffs is reasonable.

At present, DG customers are relatively few on the NSTAR Electric system. Only 12 customers would come under the standby rates proposed by the Settlement (Exhs. DTE 2-3; 3-1; 4-1). These customers would, however, be grandfathered by § 2.2 of the Settlement, as would certain prospective customers covered by § 2.4. The rates established for other customers not governed by these two provisions and how those customers, if any, may react to the Settlement Tariffs, are necessarily matters of "future relationships and conduct" the determination of whose "true nature" presents "difficulties and uncertainties" in applying the G.L. c. 30A, § 1(6) "substantial evidence" test - which difficulties the Supreme Judicial Court has pointed out in Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 251 (1966). Nonetheless, despite the difficulties of proving the future conduct of unknown members of a rate class, the proponents of the Settlement have pointed to sufficient substantial evidence of record to support accepting the Settlement under G.L. c. 30A, § 10 (second sentence, clause (2)).

In addition, the Company has a duty to maintain the safety and reliability of its distribution system, and the "exclusive obligation to provide distribution service to all customers within its service territory." G.L. c. 164, § 1B(a); 220 C.M.R. § 11.01(1); Weld v. Gas and Electric Light Commissioners, 197 Mass 556, 557 (1908). The Department has noted that widespread installation of DG, "may raise safety and reliability issues about distribution systems . . . [and] may affect distribution revenue streams and cause cost shifting among customers." Distributed Generation, D.T.E. 02-38, at 1 (Order Opening Investigation) (2002). In light of this duty, our concerns about cost-shifting, and our findings on the Settlement noted above, we conclude that it is reasonable to require non-exempt DG customers to take service under the Settlement Tariffs, and that there is no irrational or undue discrimination.

5. Grandfathering

There is one provision of the Settlement that the Department finds ambiguous. The Settlement states that:

> if the [a]vailability terms of the standby tariffs change at any time on or after August 1, 2008, any customer with on-site generation that comes on line before the effective date of such change and that is not required to take service for that on-site generation under the [a]vailability terms of these rates, will not be required to take standby service for that on-site generation because of a change in the [a]vailability terms

(Settlement at § 2.4) (emphasis added).

The Department interprets this provision to exempt only "that on-site generation" facility for the service life of that facility. The provision is evidently designed to assure investors in certain DG facilities (including renewable technologies) that, in the future, no radical change in standby rate assumptions will undercut or negate investment decisions taken in the near term. The "grandfathering" is not personal to the customer, but applies to the customer location and the DG equipment installed there before the operative dates. If we misinterpret § 2.4, the Settling Parties can inform us.

6. Conclusion

Upon review of the entire record in this proceeding, and for the reasons discussed above, the Department finds that, on balance, the Settlement is consistent with applicable law, is consistent with the public interest, and is just and reasonable because it provides a reasonable resolution of the myriad of complex issues raised in this proceeding. Therefore, the Department approves the Settlement.[20] The Department's acceptance of the Settlement does not constitute a determination as to the merits of any allegations, contentions, or arguments made in this proceeding. Moreover, the Department's acceptance of the Settlement does not set a precedent for future filings whether ultimately settled or adjudicated.

B. D.T.E. 02-38

The Attorney General proposes that the Department require all electric companies to begin collecting data that would identify on-site generation characteristics to support a separate class or classes, or support the inclusion of on-site generation customers in the otherwise applicable rate class in the next cost of service studies used to design standby customers' rates

[20] The Department notes the Settlement's confidentiality provision set out at § 3.3 does not bind the Department or preclude its inquiry as events may warrant. To the extent that the parties intend the assertion of confidentiality to be a motion for protective treatment, it is premature.

(id. at 12).[21] In addition, DOER suggests that NSTAR Electric propose a pilot program that identifies constrained locations in the Company's distribution system that may provide an opportunity for DG to alleviate such constraints (DOER Comments at 6, 9).

These proposals are reasonable for consideration, but outside the scope of this proceeding. The Department is interested in programs that present "innovative approaches to maintaining distribution reliability … that may provide valuable lessons that could be applied to distribution companies throughout the state." Massachusetts Electric Company, D.T.E. 03-53, at 3 (2003) (Targeted Demand Response Program). In D.T.E. 02-38, the Department stated that we would consider the appropriate role of DG in distribution company resource planning in light of "the potential of distributed generation to defer or postpone costly upgrades and additions to a utility's transmission and distribution system." Distributed Generation, D.T.E. 02-38-B at 40 (2004). Therefore, the proposals by the Attorney General and DOER are more appropriately addressed in that proceeding.

Although the Settlement addresses the issue of rates for standby service in the NSTAR Electric service territories for the near term, our acceptance of the Settlement is not intended to set uniform standby service policies (as we stated above, acceptance of the Settlement does not set precedent). In this regard, in docket D.T.E. 02-38, we will continue to investigate the issues involved in rates for standby service including, but not limited to, whether: (i) the

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[21] The Attorney General also raises the issues of requiring NSTAR Electric to recover transition costs as a fixed charge component of the Settlement Tariffs and requiring that the Settlement Tariffs include a contract demand transmission charge (Attorney General Comments at 10-11). These issues are outside the scope of the Settlement and we will not address them here. The proper forum to raise these issues is in NSTAR Electric's next annual transition cost reconciliation filings.

proposed standby rates ensure that customers operating their own on-site generation facilities pay an appropriate share of distribution system costs; (ii) distribution companies should recover their costs through fixed or variable charges; (iii) standby rates should reflect embedded and/or incremental costs; and (iv) distribution companies should offer firm and non-firm standby service. See D.T.E. 02-38-B at 37-38 (2004). In addition, in D.T.E. 02-38, the Department intends to investigate and address the issues raised by the Attorney General and DOER as discussed above.[22,23]

VII. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That Motion to Dismiss filed by Aegis Energy Services, Inc., American DG, Inc., Equity Office Properties Trust, Inc., Northern Power Systems, Inc., OfficePower LLC, RealEnergy, Inc., Tecogen, Inc., and Turbosteam Corporation on February 12, 2004, is DENIED; and it is

FURTHER ORDERED: That the Motion to Dismiss filed by Aegis Energy Services, Inc., American DG, Inc., Equity Office Properties Trust, Inc., Northern Power Systems, Inc., OfficePower LLC, RealEnergy, Inc., Tecogen, Inc., and Turbosteam Corporation on April 23, 2004, is DENIED; and it is

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22 The Department also intends to investigate in D.T.E. 02-38 the effect that the growth in natural gas fired DG facilities may have on the state's natural gas supply, especially at times of system peak. See D.T.E. 02-38, at 2 (2002).

23 We note the dissent published below at page 54. Not having had the opportunity to review the dissent, we are unable to comment upon it.

<u>FURTHER ORDERED</u>: That the Joint Motion to Approve an Offer of Settlement and Settlement Agreement, submitted by Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, the Commonwealth of Massachusetts Division of Energy Resources, Associated Industries of Massachusetts, the Conservation Law Foundation, Inc., Solar Energy Business Association of New England, Boston Public Schools; Co-Energy America, Inc., National Association of Energy Service Companies, Inc., and Siemens Building Technologies, District one, on June 4, 2004, be and hereby is ALLOWED; and it is

<u>FURTHER ORDERED</u>: That Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company follow all other directives in this Order.

By Order of the Department,

/s/

James Connelly, Commissioner

/s/

W. Robert Keating, Commissioner

/s/

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

DISSENTING OPINION OF DEIRDRE K. MANNING, COMMISSIONER

I respectfully dissent from the majority's decision accepting the Settlement for the following reasons. A Settlement only exempting small DG from standby rates:

1. will not promote development of large DG;
2. will not further the Romney Administration's goals stated in the climate action report and the recommendations of the outage task force report;
3. represents the interest of the signatories of the Settlement, not the public at large;
4. does not allow for consideration of the costs and benefits of DG in setting standby rates;
5. uses settled not proven costs to determine appropriate standby rates; and
6. is not necessary at this time given the Companies' healthy financial condition and the lack of record evidence that a significant amount of DG will placed in service in the near future.

In addition, the majority's acceptance of the Settlement brings the Department no closer to resolving policy goals of DG as the Settlement cannot be used as precedent in resolving future cases.

The Department is charged with representing the interests of all ratepayers, not just those that are signatories to the Settlement. For example, the provision exempting schools, in reality, only includes Boston Public Schools as it is the only school system with projects in development. Other school systems in NSTAR's service territory should have an opportunity to benefit from the Settlement. In addition, carving out an exemption for schools, which may be laudable from a public policy perspective, is arbitrary. These types of programs increase the costs to other ratepayers. They are difficult to justify without being fully vetted in a generic proceeding where the Department also may have considered exemptions for other taxpayer-funded entities, such as municipal buildings.

Adjudicating standby rates on a company-specific basis is not the best way to decide these rates. The motions by the parties, unproven information on record regarding costs, NSTAR's failure to show a difference between the cost of serving customers with or without DG, and insufficient evidence that load characteristics are different show the difficulty of attempting to adjudicate such an important issue in a short time frame (Exh. TEC-1, at 3-5). Despite the inadequacy of the record, I believe that DG customers should pay appropriate costs. A generic proceeding which may include the ISO, consumer advocates, and other groups with statewide interests would allow for informed, reasoned decisions. The generic proceeding would also help the Department in its efforts to quantify the costs and benefits of DG, which was not possible in this company-specific proceeding.

The Department has advocated at the federal level for wholesale market changes that reduce subsidies for ratepayers within the Northeast Massachusetts (NEMA) zone. It is irresponsible to promote market reforms without promoting large DG to help alleviate higher congestion charges in NEMA. NEMA is deficient in generation and the majority of NSTAR's load is in NEMA. Proposed transmission lines will help but will only be part of the solution. While the Settlement may increase renewable DG, it will take hundreds of small DG facilities to equal the generation of a large DG facility. The Department is also concerned with the reliability of the distribution grid. DG can help with the reliability of the grid. I am concerned that this Settlement will delay the advent of these benefits.

In D.T.E. 02-38B, the Department indicated that standby rates should be decided in a generic proceeding. The majority states they support a generic proceeding yet, in the interim, has approved rates for NSTAR that will impede DG development in NEMA, an area that needs generation the most. In addition, the decision will likely result in the other utility companies requesting standby rates.

This proceeding did not allow for an examination of true costs of serving DG customers. The rates offered by NSTAR, are not fully litigated rates. While the current rates are Department approved, they are not proven to be cost based. In fact, NSTAR rates are likely not cost based. The last litigated rate case for the company was in 1986. Since that time, there was a merger and various Settlements, including the unbundling of distribution rates. The Companies' most recent return on equity ("ROE") as reported in SEC filings was 13.9 percent in 2002 and 13.5 percent in 2003. These figures are much higher than the Department allowed rate of return from the early nineties.[1] The earnings of the company are even higher than one would expect from a company that no longer bears the risk from owning generation assets. The Department has recently ordered ROE's in the ten percent range reflecting the reduced risk of running a monopoly utility company in Massachusetts.[2] The

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1 Boston Edison was allowed a ROE of 12.00 percent in its last litigated rate case, D.P.U. 85-271, (1986). The Boston Edison, D.P.U. 89-100 rate case was settled. In Boston Edison Company, D.P.U. 92-92, the ROE was capped at 11.75 percent in a settlement. Cambridge Electric Light Company was allowed a ROE of 11.00 percent in D.P.U. 92-250 (1993). Commonwealth Electric Company was allowed a ROE of 12.00 percent in D.P.U. 90-331. Commonwealth Gas was allowed 13.25 percent ROE in its last litigated rate case, D.P.U. 87-122. Its 1991 case was settled, D.P.U. 91-60.

2 The most recent ROE's allowed were 10.50 percent for Blackstone Gas Company and The Berkshire Gas Company in DTE 01-50 and DTE 01-56, respectively, 10.00 percent for Fitchburg Gas and Electric Light Company in D.T.E. 02-24/25, issued in (continued...)

Company has also increased its revenues since the Settlements through increasing non-tariffed service fees and the recovery of pension cost through a pension adjustment mechanism.

In addition, there is evidence indicating only one large DG unit is coming on line in the near term. The Company states that there is only one project that is larger than 250 KW, a 10 MW project (Exhs. DTE-2-3; 3-1;4-1; DOER-1-1, Att. DOER-1-1(a)). Given the healthy financial condition of the Company and lack of DG development, a standby rate at this time is premature. These tariffs should have been rejected and the rates decided in a generic proceeding.

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[2] (…continued)
2002, and 10.20 percent for Boston Gas Company in D.T.E. 03-40, issued in 2003.